or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction; * * *."

2. Section 23(b) of the Bankruptcy Act as amended, 11 U.S.C. § 46(b), provides in pertinent part as follows:

"SEC. 23. JURISDICTION OF UNITED STATES AND STATE COURTS.

* * * * *

"b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this title had not been instituted, unless by consent of the defendant, * * *."

3. Sections 1332(a) and (c) of Title 28, U.S.C., as amended in 1958, provides as follows:

"**§ 1332. Diversity of citizenship; amount in controversy; costs**

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

"(1) citizens of different States;

"(2) citizens of a State, and foreign states or citizens or subjects thereof; and

"(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

* * * * *

"(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to

which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business."

4. Rule 8(a), F.R. Civ. P., provides as follows:

"Rule 8. General Rules of Pleading

"(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

STATEMENT

This was a plenary action brought in the Federal court for eastern Pennsylvania by the bankruptcy receivers of a painting contractor, Kemmel & Co., Inc., hereinafter "Kemmel." The action sought compensation in the amount of over $418,000 from the general contractor, McCloskey & Co., Inc., hereinafter "McCloskey," for work originally undertaken at a fixed price of $290,000 under a detailed written contract, but allegedly completed under a subsequent oral agreement that the entire job should be paid for on a cost plus basis. On the merits the receivers recovered a judgment for $271,346.37 (R. 666a), which on appeal was reduced by $78,843.44 representing an item for overhead (*infra*, pp. A7, A18, A19).

The merits are no longer in question; only the jurisdiction of the district court is now in issue; the statement that follows is limited accordingly.

The jurisdictional averments of the receivers' complaint were as follows (R. 6a):

> "1. N. L. WYMARD and GEORGE L. STARK were, by Order of this Court, dated March 2, 1960, appointed receivers of KEMMEL & Co., INC., Debtor Plaintiff in the above entitled matter and have duly qualified and are now acting in such capacity as receivers.
>
> "2. On May 2, 1960 Plaintiffs obtained an Order of the Referee in Bankruptcy permitting them to sue the above named McCLOSKEY & Co., INC., Defendant, by reason of the facts more fully set forth herein.
>
> "3. Plaintiff is a corporation incorporated and existing under the laws of the Commonwealth of Pennsylvania. Defendant is a corporation incorporated under the laws of the State of Delaware. The matter in controversy exceeds, exclusive of interests and costs, the sum of $10,000."

McCloskey moved to stay proceedings pending arbitration, on the ground that Kemmel had by agreement precluded itself from litigating the claim in suit until a pending arbitration was resolved. This motion was denied (R. 1a-2a; 190 F. Supp. 420 (E.D. Pa.), affirmed, 292 F. 2d 839 (C.A. 3)), and McCloskey thereupon answered the receivers' jurisdictional allegations quoted immediately above by admitting all of them (R. 36a-37a).

As a fourth defense, McCloskey sought affirmative relief by way of counterclaim, seeking nearly $250,000 in respect of an alleged loan to Kemmel (R. 47a-49a).

Following a trial on the merits, the district court made the following findings of fact respecting jurisdiction (R. 655a):

> "1. Kemmel is a painting contractor incorporated and existing under the laws of the Commonwealth of Pennsylvania.
>
> "2. McCloskey is a general contractor incorporated under the laws of the State of Delaware."

It also made this jurisdictional conclusion of law (R. 666a):

> "1. We have jurisdiction of the parties and the subject matter."

When McCloskey appealed (R. 668a), court below on its own motion raised the issue of jurisdiction, and on June 18, 1964, vacated the judgment below with directions to give the receivers leave to amend; its order was in these terms (R. 2aa):

> "It is ORDERED that the judgment of the District Court be and it hereby is vacated, with instructions to grant the plaintiffs leave to amend their complaint so that it will properly allege its jurisdictional basis, in accordance with Rule 8 of the Federal Rules of Civil Procedure, whether jurisdiction be based on the Bankruptcy Act or an diversity of citizenship, or both, bearing in mind that an allegation of the principal place of business of a corporate party is an essential part of a proper pleading of diversity jurisdiction."

Thereupon a motion for rehearing en banc was granted (R. 3aa), following which the earlier order of remand was vacated, and a new order entered, as follows (R. 1bb-2bb):

> "It is further ORDERED that the cause in the above entitled case be and it hereby is remanded to the District Court with leave to the plaintiffs to apply to that Court for leave to amend their complaint in the case of N. L. Wymard and George L. Stark, Receivers of Kemmel & Co., Inc. vs. McCloskey & Co., Inc., Civil No. 28147, so as to properly allege its jurisdictional basis, whether it be based on diversity of citizenship, or bankruptcy, or both, bearing in mind that an allegation of the principal place of business of a corporate party is an essential part of a proper pleading of diversity jurisdiction;
>
> "It is further ORDERED that the District Court certify to this Court as a supplement to the record on appeal all proceedings subsequent to this order, including inter alia, plaintiff's petition to amend, the

answer, the District Court's order on the petition, and if granted, the District Court's order and opinion with respect to its own jurisdiction of the amended complaint;

"It is further ORDERED that the cause be and it is retained as a pending appeal in this Court."

Following certain written objections by McCloskey (R. 1aa, 3bb), and a conference with the district judge in chambers (R. 4bb-30bb), the receivers formally elected not to amend in either respect suggested by the court of appeals (R. 31bb). The district court thereupon considered the jurisdictional issue pursuant to the order of remand, and concluded that "McCloskey waived its objection to the jurisdiction of the District Court and manifested its complete consent as required by Section 23(b) of the Bankruptcy Act" (R. 36bb); its new opinions (R. 32bb-38bb) were duly certified to the court of appeals.

That tribunal reheard the case en banc, divided 5 to 3 in affirming the judgment below as to jurisdiction (writing two opinions in the process), but agreed that the award in favor of the receivers must be reduced by $78,843.44.

Judge Hastie, writing for the court, noted that McCloskey had entered a general appearance, interposed objections, moved to stay proceedings, filed an answer and a counterclaim, and went to trial. He accordingly held that these acts constituted a manifestation of acquiescence that the controversy be adjudicated in the federal forum, the more so since the case had now been fully litigated. He said (*infra*, p. A5):

"Mere mistake or oversight as to the legal consequence of facts clearly alleged in the complaint does not vitiate such consent. Certainly, if the defendant had simply been unaware that section 23(b) existed, that would not have invalidated its consent. We think the additional legal mistake as to the existence of diversity jurisdiction had no greater effect."

Judge Freedman, concurring in an opinion in which each member of the majority also concurred, said (*infra*, pp. A7-A8, A9):

> "The question presented is a close and difficult one. Decisive for me, however, is the fact that in the present case a full trial has been held and a decision reached on the merits, including the defendant's counterclaim, all without any objection to the jurisdiction of the court.
>
> • • • • •
>
> "In the circumstances of the present case, therefore, I would hold that the defendant's conduct which culminated in a full adjudication of the merits of the controversy, constituted an acceptance of the jurisdiction of the Court which it is now too late to deny."

Judge Kalodner and two other judges dissented, on the ground that § 23(b) of the Bankruptcy Act was a limitation on the jurisdiction of Federal courts, which in the face of its provisions could only be created by consent. The heart of his dissent is in these passages (*infra*, pp. A17, A18):

> "It is obvious that one cannot *consent* to the jurisdictional premise of a suit of which he is *unaware*, and of which the prosecutor of the suit and the court which tries it are equally unaware. Section 23(b) certainly requires that the *consent* to jurisdiction be a *knowing consent* since the creation of jurisdiction is dependent on it.
>
> • • • • •
>
> "There was not even a 'pretense in this case' of *consent* to the suit within the meaning of Section 23(b) as construed by the Supreme Court."

REASONS FOR GRANTING THE WRIT

The apparent uniqueness of the facts just recited is deceptive, for actually the present case involves a principle of general application, one consistently ruled by this Court in many fields of law, but which the majority en banc below quite overlooked in its preoccupation with the details of the litigation.

"A waiver," this Court has often held (e.g., *Johnson* v. *Zerbst*, 304 U.S. 458, 464), "is ordinarily an intentional relinquishment of a known right or privilege." The heart of this case is that the majority below have spelled out a consent to be sued in Federal court under § 23(b) of the Bankruptcy Act in a situation where the undisputed facts negative any conscious choice on petitioner's part, since it, together with the respondents and the district court, believed that the allegations, admissions, findings, and conclusion of diversity jurisdiction established an independent and indeed unassailable ground of Federal jurisdiction.

First. Nothing here turns on verbal differences between "consent," "acquiescence," and "waiver"; pursuit of these and similar dialectical or lexicographical variants would plainly be unprofitable. It is similarly unhelpful to read into or out of § 23(b) of the Bankruptcy Act broad generalizations regarding the proper distribution of judicial power between Federal and State courts, for in both of the most recent leading cases construing that section there was lacking the allegation of diversity jurisdiction that creates the present problem. *Schumacher* v. *Beeler*, 293 U.S. 367, 370; *Williams* v. *Austrian*, 331 U.S. 643, 645. Accordingly, those decisions cast no light whatever on the issue that so sharply divided the court below.

Second. The basic question here is whether there can be a waiver, or a consent, or acquiescence, where the facts establish the absence of any conscious choice, for in this case the mutual and indeed triple mistake on the part of both parties plus the district court, of overlooking the limitations imposed in 1958 on corporate diversity jurisdiction, entirely negatived knowing consent to suit in Federal court under § 23(b) of the Bankruptcy Act—a jurisdiction that was neither alleged originally (R. 6a) nor supplied by amendment (R. 31bb) even after the court of appeals specifically suggested that precise additional allegation (R. 2aa, 1bb-2bb)—quite as much as the mutual

mistake of the parties over the identity of the ship *Peerless* negatived consent in the classic case of *Raffles* v. *Wichelhaus*, 2 Hurl. & C. 906.

Third. As this Court has said (*Green* v. *United States*, 355 U.S. 184, 191), "'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary *knowing* relinquishment of a right." (We have italicized the word "knowing.") That test of waiver has been applied by this Court in litigation involving the National Labor Relations Board (*Labor Board* v. *Lion Oil Co.*, 352 U.S. 282, 293) and the Federal Trade Commission (*St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 217), as well as in decisions dealing with such constitutional issues as due process of law, the privilege against self-incrimination, search and seizure, the right to counsel, and double jeopardy.

The requirements for a valid waiver, though uniformly applied, have been variously phrased. "Understandingly" was the word used in *Uveges* v. *Pennsylvania*, 335 U.S. 437, 441. "Unequivocally and intelligently" was twice employed, in *Quinn* v. *United States*, 349 U.S. 155, 164, and in *Emspak* v. *United States*, 349 U.S. 190, 195. Other variants met with in the books are "intelligently and understandingly" (*Herman* v. *Claudy*, 350 U.S. 116, 118; *Moore* v. *Michigan*, 355 U.S. 155, 161; *Carnley* v. *Cochran*, 369 U.S. 506, 516), "intelligent and competent" (*Johnson* v. *Zerbst*, 304 U.S. 458, 465), and "meaningful" (*Green* v. *United States*, 355 U.S. 184, 192; *Blackburn* v. *Alabama*, 361 U.S. 199, 211).

But at the heart of all these differently formulated wordings of the unquestioned standard is the indispensible element of conscious knowledge—"a known right or privilege" (*Johnson* v. *Zerbst*, 304 U.S. 458, 464); "voluntary knowing relinquishment of a right" (*Green* v. *United States*, 355 U.S. 184, 191), "understandingly and know-

ingly" (*Fay* v. *Noia*, 372 U.S. 391, 439), a "considered choice" (*ibid.*). For there can be no waiver "when the defendant does not know of his right" (*Gibbs* v. *Burke*, 337 U.S. 773, 780).

It is no answer to say, as the court did (*infra*, p. A5, quoted *supra*, at p. 8), that the situation is the same as if petitioner had been completely unaware of § 23(b). We can assume either petitioner's awareness of that provision or proceed on the footing that petitioner was chargeable therewith; the point here is that consideration of § 23(b) and of its consequences was in fact blocked from view by the assumption, which petitioner shared not only with the adverse party but with the district judge, that an unassailable basis of Federal jurisdiction because of diversity allowed no scope for, and precluded the operation of, § 23(b). Nor was this jointly shared assumption, as the court went on to say (*loc. cit.*), an "additional legal mistake." Under the 1958 amendment, diversity requires a factual determination regarding each corporation's principal place of business, a fact not in the record, and in respect of which the court of appeals remanded the case for factual determination (R. 2aa, 1bb-2bb, quoted *supra* at pp. 7-8).

Fourth. We do not here invoke the doctrine of the constitutional cases—citations are legion—that waiver of fundamental rights are not lightly to be inferred. We only assert that there must be a conscious waiver, a knowing act—which, very plainly, was wholly lacking here, where all concerned concurred in the sufficiency of the unchallenged averment of diversity jurisdiction, which established a basis for Federal jurisdiction quite independent of consent by the petitioner.

Inasmuch as a conscious, knowing choice constitutes the minimal requirement for any waiver under all of this Court's decisions, a requirement that was ignored by the majority en banc below, the decision sought to be reviewed

presents, not a peculiar or an unusual or a non-recurrent factual pattern, but rather the broad disregard of a general legal principle that this Court has consistently and indeed universally applied.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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